

To Catch a Spy: India v. Pakistan at the ICJ

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Court encounters between Pakistan and India usually entail twenty-two sweaty men batting and jumping after a cricket ball in stadiums financed with Saudi oil-money. This time around however, the court India and Pakistan have been fencing in is nestled inside The Hague's Peace Palace: the International Court of Justice, financed with Carnegie steel-money. To summarise the facts of the ongoing [Jadhav case](#) is to already take sides. Everything is disputed.

After the hearings we know the following: (1) in early 2016, an Indian Navy Officer with the name Khulbushan Jadhav was picked up by Pakistani authorities (2) a few weeks later Pakistan informed India about Jadhav's detention but refused consular access (3) in April 2017, a Military Court in Pakistan sentenced Jadhav to death for plotting terrorist acts.

Pakistan claims that Jadhav is a spy. He was arrested during a military operation that sought to smash a student movement held responsible for [fuelling an insurgency](#) in Baluchistan, one of Pakistan's provinces bordering Iran. They say that Jadhav was carrying an authentic Indian passport under the cover-name "Hussain Mubarak Patel"; they also found out that his other codename was "monkey" and that he was travelling with suspicious spy paraphernalia: US dollars, Iranian rials, and so on. Jadhav confessed. In a video Pakistan extensively cites, Jadhav [states plainly](#): "I was basically the man for Anil Kumar Gupta, who is the joint undersecretary of RAW [India's foreign intelligence agency] and his contacts in Pakistan especially in the Baluchistan Student Organisation".

India claims Jadhav wasn't even in Pakistan when he was picked up; he was [kidnapped from](#) Iran. There, he was running a legitimate trading business after retiring early from military service. India believes that Jadhav probably only confessed after some torturing. Regarding the passport situation, nothing could be verified because India lacked consular access. India argues that Pakistan violated the [Vienna Convention on Consular Relations](#), a treaty to which both countries signed up, by not providing the opportunity to be in touch with Jadhav. Further, India claims, Jadhav's rushed trial in front of military courts violated international standards to a fair trial. Civilians belong in front of [civilian courts](#).

India wants the ICJ to [sack the ruling](#) of the Military Court and order Pakistan to provide Jadhav a safe passage back to India.

Vienna Convention Consular Regulations, Article 36 and Espionage

According to [VCCR Article 36](#), a detained foreign national has to be advised about his right to contact a consular officer. If he so requests, the authorities have to convey his message to the consular officer (b). Consular officers “shall have the right to visit” their imprisoned national (c). India objects that in the case of Jadhav all three principals have been violated. It remains unclear, they argue, if Jadhav had been advised that he could get in touch with an Indian consular officer. The second objection India raises runs along the line that Pakistan informed them only a couple of weeks into Jadhav’s detention, which is to say, not “without delay”. Finally, India objects that [Pakistan has shielded](#) Jadhav from any meaningful consular access.

Pakistan interprets the Vienna Convention differently. [They argue](#) one should focus less on the wording of the treaty – which warmly embraces all “foreign nationals” – and focus more on the treaty’s historic development, its intent and purpose, and, for good measure, established international custom. Their argument runs that when the arrest is based on [suspicion of espionage](#), it has to be regarded as fundamentally different from standard criminal arrests of foreign nationals where the Vienna Convention applies. National security, however, would constitute a [justifiable limitation](#) and prevent the triggering of rights claimed through the Vienna Convention. When a country would allow another nation to have access to their captured moles, they may as well send all information directly to them.

The oral proceedings of Harish Salve, India’s counsel, were a little rough around the edges; his monotonous reading was, at times, [difficult to follow](#). The Pakistani counsel, Khawar Qureishi, on the other hand, was so polished that his performance bordered on the theatrical; his QC-gear (black silk robe and his white horsehair wig) strengthened [this impression](#). Very much like in an opera house then – on day three of the hearings, just after lunch – a Pakistani gentleman fell asleep halfway during Qureishi’s act; the man snored so loudly that he had to [be reprimanded](#).

While it would be interesting to see how the Court positions itself regarding violations of the Vienna Convention in espionage cases, the case may still be withdrawn. There would be precedent for it. In summer 1973, when India threatened to hand over 195 Pakistani prisoners of war to Bangladesh, Pakistan ultimately [withdrew its ICJ](#) case against India to negotiate a political solution instead. Imran Khan and Narendra Modi, the two respective prime ministers, could still arrive at an understanding that would lead to a smoother end of the Jadhav case.

So how is one to go about captured spies? For anyone who has seen a cold-war flick the answer is obvious: wear fancy trench-coats and schedule prisoner swaps on foggy bridges. But much of the cold-war spy game with its (fake) moustaches, wigs, passports, and dollar bundles has come to an end. It almost seems a little quaint to attempt a judicial resolution of these issues, when much of the intelligence industry has morphed into something new. The days where a man was sent across a border with cash and a fake passport to ignite a revolution are over. Falsifying news and

shaping public opinion through bots are the issues that international law should step up to.

